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To Disclose or Not to Disclose: The Relationship Between Confidentiality in Mediation and the Model Rules of Professional Conduct

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To Disclose or Not to Disclose: The Relationship Between Confidentiality in Mediation and the Model Rules of Professional Conduct

> *Discourage litigation. Persuade neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, expenses, and a waste of time. As a peacemaker the lawyer has superior opportunity to become a good [person].*[1]

I. Introduction

As increasing numbers of lawsuits crowd courts, people are exploring alternatives to the adversarial process.[2] Mediation,[3] in particular, has become an effective alternative to lengthy and potentially destructive court proceedings.[4] Mediation allows parties to solve their own problems, with minimal interference from third parties.[5] The participation of lawyers as mediators of disputes involving other lawyers, however, generates ethical dilemmas.

This Comment discusses the effect of the *Model Rules of Professional Conduct*[6] on the lawyer's duty to maintain confidentiality in mediation. Specifically, this Comment focuses on the conflict between the lawyer's duty to disclose misconduct revealed during mediation,[7] and his duty to keep disclosed information confidential.[8] The

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1. A. Lincoln, Notes for a Law Lecture (July 1, 1850), *reprinted in* Marcellino, *Mediation and Arbitration—Ethical Considerations*, 32 BOSTON BAR J. Sept.-Oct. 1988, at 5.

2. *Compare* ABA Special Committee on Dispute Resolution, *Dispute Resolution Directory* (1981) (141 programs in existence) *with* ABA Special Committee on Dispute Resolution, *Dispute Resolution Program Directory* (1986-87) (over 300 programs in existence).

3. Mediation is defined as "the process by which a neutral mediator assists the parties in reaching a mutually acceptable agreement as to issues of a dispute. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, and finding points of agreement." KAN. SUP. CT. R. 901(a).

4. Other forms of dispute resolution can also be effective substitutes for adversarial justice. These substitutes include arbitration, rent-a-judge, and the mini-trial. Of these alternatives, mediation provides the least amount of third party involvement. *See generally* S. GOLDBERG, E. GREEN, F. SANDER, DISPUTE RESOLUTION (1985).

5. *Id.*

6. MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter MODEL RULES] (1983). The Model Rules were adopted by the House of Delegates of the American Bar Association on August 2, 1983. The Rules, like all model legislation, are intended to serve as a nationwide framework for implementation of standards of professional conduct.

7. *See infra* notes 56-119 and accompanying text.

lawyer's duty to disclose another lawyer's misconduct is mandated by the *Model Rules of Professional Conduct*.[9] The lawyer's duty to keep information confidential is essential to effective resolution of the parties' dispute through mediation.[10]

This Comment begins with an overview of lawyer dispute resolution programs and the need for confidentiality in mediation. The Comment then addresses the disclosure requirements of the *Model Rules of Professional Conduct* (Model Rules), and the *Model Code of Professional Responsibility* (Model Code).[11] Next, the Comment analyzes the disclosure problems and examines solutions that other states have implemented for similar problems.[12] Finally, a different solution is proposed and its advantages and disadvantages are explained.

II. History, Background, and the Status Quo of Mediation and the Disclosure Provisions of the Model Rules of Professional Conduct

A. Mediation

1. Increased Popularity of Mediation in Dispute Resolution.—In mediation, a neutral third party with no stake in the outcome of the dispute and no power to impose a solution on the parties helps the disputants to resolve their conflict.[13] In the face of rising court costs and increased delays, mediation has become popular in recent years.[14] Once used only for specific types of disputes, mediation is rapidly finding employment as a problem solving method for disputes that were formerly resolved only through the adversarial process.[15]

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8. *See infra* notes 21-55 and accompanying text.

9. *See supra* note 6.

10. Since the mediator cannot compel the parties to give information, a promise of confidentiality serves as an impetus for the parties to reveal information and feelings that they might otherwise not reveal.

11. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE]. The Model Code was the predecessor to the Model Rules and consists of three separate but interrelated parts: Canons (axiomatic norms), Ethical Considerations (aspirational objectives), and Disciplinary Rules (mandatory rules of conduct).

12. These problems represent the conflict between the need for confidentiality in various lawyer help programs and the Model Rules' disclosure provisions.

13. *See supra* note 3.

14. *See supra* note 2.

15. Traditionally in the United States, mediation has been limited to the area of disputes between labor and management, and disputes between or among members of certain ethnic groups or communities. In the past ten to fifteen years, however, mediation has become increasingly popular in other areas. Divorce cases, environmental disputes, neighborhood disputes, and civil rights matters are among these new areas of application. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 30-34 (1982). *See also* K. KRESSEL, THE PROCESS OF DIVORCE, 185-202 (1985) (discussing the success of mediation as a substitute for the adversary

Mediation has become popular for several reasons. First, agreements reached through mediation usually have a higher compliance rate than judgments handed down by the courts.[16] The mediating parties invest a great deal of time, effort, and money into reaching an agreement and are more likely to abide by the terms of the agreement.[17] Second, the mediation process preserves ongoing relationships among the disputing parties. Because of the inherent flexibility in the mediation process, it is possible for agreements to include conditions other than the payment of money. Consequently, the win-lose situation inherent in the adversary process is avoided.[18] Also, future relations between the parties can improve because a successful mediation session reveals a new and relatively inexpensive process by which the parties can resolve future disputes. Third, mediation involves considerably less time and expense than other forms of dispute resolution.[19] The costs in attorney's fees alone often makes it uneconomical for parties to try to settle a minor dispute through the adversary process. By utilizing informal mediation, the parties can save money and preserve future relations with each other.[20]

2. The Need for Confidentiality in Mediation.—Perhaps the most appealing aspect of mediation is its promise of confidentiality. Mediators emphasize that all information revealed in a mediation session should remain confidential.[21] A mediating party presumes

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process in divorce); A.B.A. STATE LEGISLATION ON DISPUTE RESOLUTION (Standing Committee on Dispute Resolution 1988) (at least forty-two states have laws providing for mediation of disputes in various areas).

16. McEwan & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 263-64 (1981).

17. This investment includes the parties' time as well as their financial outlay. This same investment also works as an incentive to the parties finally to come to an agreement, as not coming to an agreement would be viewed as a loss. Data shows that mediated agreements have higher compliance rates for this reason. *Id.*

18. According to one commentator, however:

> Contrary to the expectation that flexible and creative settlements would occur, few mediation agreements (only 12%) in Maine have involved any conditions besides payment. This is not because other issues were never present in these disputes; respondents in 40% of the mediated cases reported the presence of "other issues" besides money in their dispute. It appears however, that with few exceptions such matters were converted into dollars and cents for purposes of the agreement.

Id. at 253.

19. The time element referred to here is not the actual time it takes to resolve the dispute, as the adversary process often can efficiently resolve disputes. Nevertheless, the parties may wait a long time to get into court, and such a time lag may make matters worse.

20. In time, these small disputes may destroy ongoing relationships.

21. In a 1981 survey conducted by the American Bar Association, the majority of responses stressed the importance of confidentiality to the effectiveness of a mediation program. Freedman, *Confidentiality: A Closer Look*, in ABA Special Committee on Dispute Resolution,

that everything he says during the course of the process will remain confidential.[22] Unlike a judge or an arbitrator, the mediator has no ability to coerce the parties. Therefore, the mediator must guarantee confidentiality to the parties so that they will be willing to reveal their true interests.[23] Confidentiality, then, is as essential to a mediator as it is to an attorney,[24] a doctor,[25] or a psychiatrist.[26]

At least four reasons justify the need for confidentiality in mediation. First, it would be nearly impossible for the mediator to discover all of the underlying problems at issue without a guarantee of confidentiality.[27] Second, confidentiality allows the mediator to maintain neutrality in the eyes of the disputants. It is important that the disputants view the mediator as an unbiased person.[28] If one of the disputants views the mediator as biased, he would surely not trust him and, therefore, the mediator's task would be nearly impossible to achieve. Third, a mediator who guarantees confidentiality is protected from the distractions of frequent subpoenas that could impede his efficiency.[29] Finally, the confidentiality aspect of mediation

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Alternative Dispute Resolution: Mediation and the Law: Will Reason Prevail? 70 (1983).

22. Not all information will be kept confidential. For example, every state has passed a statute that mandates child abuse to be reported to authorities. *See* Murphy, *Mediation and the Duty to Disclose*, CONFIDENTIALITY IN MEDIATION: A PRACTITIONERS GUIDE 87 (L. Freedman, C. Haile, & H. Bookstaff eds. 1985).

23. *See supra* note 10. The mediator's role is to aid the parties in identifying areas of disagreement. A promise of confidentiality is necessary for the mediator to gain access to the parties real interests.

24. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 390 (1981) (the attorney-client privilege exists to protect the information the client gives to his lawyer).

25. *See, e.g.*, Hardy v. Riser, 309 F. Supp. 1234, 1238 (N.D. Miss. 1970) (the doctor-patient privilege encourages full and confidential disclosure of all information that might aid the physician in making his diagnosis).

26. *See, e.g.*, United States v. Layton, 90 F.R.D. 520, 526 (N.D. Cal. 1981) (recognizing that "therapy will usually be seriously jeopardized by the lack of any guarantee of confidentiality").

27. *See supra* note 23 and accompanying text.

28. Congress created the Community Relations Service and gave the Service powers to provide assistance to communities and residents to resolve disputes. Congress specifically provided that

> [n]o officer or employee of the Service shall engage in the performance of investigative or prosecuting functions of any department or agency in any litigation arising out of a dispute in which he acted on behalf of the Service. Any officer . . ., who shall make public in any manner whatever any information in violation of this subsection, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1000 or imprisoned not more than one year.

42 U.S.C. § 2000(g)-(2) (1982). *See also* Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985) (trial court did not abuse its discretion in refusing to admit mediator's report for community relations service on the basis that it would violate the confidentiality requirement of the governing statute).

29. If a mediator is constantly called into court to testify about information revealed during mediation, he has less time to mediate disputes. The lost time can be crucial when the mediator has a crowded docket. As a result, other disputants often suffer delays in resolving

makes it a very attractive alternative to other forms of dispute resolution. Parties often prefer to keep disputes out of the newspapers; by settling these disputes through mediation, privacy is protected.[30]

Confidentiality in mediation is protected in several ways.[31] None of the methods, however, are foolproof. For example, rules of evidence usually protect only the admissibility of the information dealing with proof of the validity of the plaintiff's claim.[32] Moreover, these rules do not exclude evidence in subsequent litigation over related claims raised after the mediation.[33] Furthermore, evidentiary rules usually do not provide protection from public disclosure of information and from use of information in administrative and legislative hearings.

Private agreements are a second method used to protect confidentiality in mediation. At the outset of mediation, disputants agree that nothing said during the mediation will be disclosed. Courts do not always uphold these agreements, however.[34]

Many states have enacted legislation that specifically deals with the issue of confidentiality in mediation.[35] Some of these statutes provide for limited protection of confidentiality,[36] while others have provided for blanket protection.[37] There is constant debate over

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their disputes.

30. These reasons might include the sensitivity of the issue and its effect on the individual, or reasons other than personal reasons (e.g. dispute would defame his profession).

31. *See generally* Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. DIS. RES. 1 (1986) [hereinafter Green]; Prigoff, *Toward Candor or Chaos: The Case of Confidentiality In Mediation*, 12 SETON HALL LEGIS. J. 1 (1988) [hereinafter Prigoff]; C. MCCUNE & N. ROGERS, MEDIATION LAW POLICY AND PRACTICE (1988).

32. *See, e.g.*, FED. R. EVID. 408. *See also* 2 WEINSTEIN'S EVIDENCE 408 [08] (listing states that have adopted rules paralleling FED. R. EVID. 408.)

33. *See* E.E.O.C. v. Air Line Pilot's Ass'n., 489 F.Supp. 1003, 1010 n.8 (D. Minn. 1980) (evidence from conciliation admitted to allocate damages), *rev'd and remanded on other grounds*, 661 F.2d 90 (8th Cir. 1981).

34. *See* Garden State Plaza Corp. v. S. S. Kresge Co., 78 N.J. Super. 485, 500-03, 189 A.2d 448, 456-58 (contract not enforceable, parole evidence rule governs courts access to negotiation evidence), *cert. denied*, 40 N.J. 226, 191 A.2d 63 (1963); Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 450-52 (1984) (agreements to preserve confidentiality are generally held to be void as suppression of evidence, which is against public policy). *But see* NLRB v. Joseph Macaluso, Inc. 618 F.2d 51 (9th Cir. 1980) (complete exclusion of mediator's testimony necessary to preserve effective system of labor mediation outweighed interest in obtaining mediator's evidence); People v. Snyder, 129 Misc. 2d 137, 139, 492 N.Y.S. 2d 890, 892 (Sup. Ct. 1985) ("[T]he legislatures clear intention is to guarantee the confidentiality of all such records and communications.").

35. *See, e.g.*, CAL. CIV. CODE § 4607 (West Supp. 1991); COLO. REV. STAT. § 13-22-307 (1987); CONN. GEN. STAT. ANN. §§ 46b-53(c) (West 1986); IOWA CODE ANN. § 679.12 (West 1987); N.Y. JUD. LAW § 849-b (McKinney Supp. 1991); OKLA. STAT. ANN. tit. 12, § 1805-1813 (West Supp. 1991); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon Supp. 1991).

36. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon Supp. 1991).

37. *See, e.g.*, CAL. EVID. CODE § 1152.5 (West 1966 & Supp. 1991); MASS. GEN. LAWS

which methods should be employed to keep disclosed information confidential.[38] It is essential that such information remain confidential if mediation is to continue to be an attractive alternative to dispute resolution.

3. Lawyer Dispute Resolution Programs.—The past decade has ushered in a new era in the legal profession. Intensified competition among law firms has resulted in a more businesslike atmosphere, bringing with it the good and the bad. Battles over money, strategy, power, policy, and personnel are more common and more likely to result in permanent separation of attorneys from their places of employment. The increase in disputes among law firms and lawyers has given rise to a need in the profession for dispute resolution programs that will keep this unappealing litigation out of the courtroom and away from the public eye.[39]

Several state bar associations have responded to this call for informal dispute resolution.[40] Some programs developed to handle

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ANN. ch. 233 § 23C (West 1986).

38. *Compare* Green, *supra* note 31 *with* Prigoff, *supra* note 31.

39. In a report of the New York City Bar Association Committee on Arbitration and Alternative Dispute Resolution, the committee concluded that an alternative dispute resolution program was needed for these disputes. Specifically, the report stated:

> To the extent that disputes among lawyers can be kept out of the courts, a judicial system which at least in New York City is already severely overburdened will be relieved of such cases . . . .
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> . . .
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> The benefits to the profession seems equally obvious. Not only is it unseemly for lawyers to engage in litigation among themselves; it betokens an inability to adjust their conflicting interests short of litigation, and thus a failure to fulfill one of their most important societal functions when faced with conflicts among themselves. Media exposure of litigation between lawyers can only erode further the public image of the profession.

New York City Bar Ass'n. Comm. on Arbitration and Alternative Dispute Resolution, *Proposal for Association-Sponsored Arbitration of Disputes Among Lawyers*, 42 RECORD 877, 884 (1987) [hereinafter NYC Comm., *Proposal*].

40. *See, e.g.*, Denver Bar Ass'n Intraprofessional Disputes Comm., *Plan for Screening Intraprofessional Disputes* (as amended Apr. 21, 1982 and Jan. 19, 1984) [hereinafter *Denver Plan*] ("The purpose of the Plan is to investigate on a confidential basis and, where possible, resolve disputes between attorneys to the end that the public and the legal profession will be protected from intraprofessional disputes which can hinder and delay the orderly administration of justice and legal affairs."); New York City Bar Ass'n Comm. on Arbitration and Alternative Dispute Resolution, *Rules for Association-Sponsored Mediation of Disputes Between Lawyers*, 43 RECORD 984 (1988) [hereinafter NYC *Mediation Rules*] (discussing use of mediation as a less intrusive alternative to arbitration in the resolution of disputes among lawyers); NYC Comm., *Proposal*, *supra* note 39; PENNSYLVANIA BAR ASS'N. LAWYER DISPUTE RESOLUTION PROGRAM RULES (amended Mar. 17, 1988) [hereinafter PA. RULES]; San Francisco Bar Ass'n Subcomm. on Arbitration of Law Firm Dissolutions and Fee Disputes Among Attorneys, *Special Rules of Procedure IA*, (June 19, 1987) [hereinafter *San Francisco Rules*] ("These Special Rules are designed to respond to many requests from attorneys that the Committee assist in resolving [dissolution and attorney fee] disputes."); CLEVELAND BAR ASS'N., LAWYER DISPUTE ARBITRATION [hereinafter CLEVELAND STATEMENT].

these disputes were arbitration programs;[41] however, mediation has become more popular.[42] The reason why mediation has become more popular is, perhaps, best expressed by the New York City Bar Association in its proposal to add mediation to its program. The proposal stated that "[i]n a temporal sense, the committee provides a procedural 'horse' that belongs before the arbitration 'cart' that our prior arbitration report has constructed."[43]

The benefits of mediation as an alternative to litigation apply equally well to mediation among lawyers.[44] The confidentiality aspect of mediation keeps such disputes out of the media, which helps prevent further erosion of the public image of lawyers.[45] In addition, the time saving aspect of mediation is especially attractive to legal disputes.[46] Mediation ensures that client representation does not suffer because of time spent by lawyers in personal litigation. The types of disputes that usually arise between attorneys also make mediation an appropriate forum for resolution.

The types of disputes that mediation programs handle include disputes involving law firm dissolution, departures of one or more attorneys from a law firm, and fee disputes between members of different firms.[47] It is relatively easy to imagine how disputes involving law firm dissolutions come about,[48] but for many, it is hard to imagine the animosity that develops during litigation between partners undergoing a breakup. During these proceedings, it is not uncommon for attorneys to accuse their partners of theft, conversion, breach of fiduciary duty, malicious interference with contract, and other egregious acts.[49] The ramifications can be devastating to the attorneys' legal careers, even if the charges are eventually found to be without

41. *See, e.g., San Francisco Rules, supra* note 40; CLEVELAND STATEMENT, *supra* note 40.

42. *See* PA. RULES, *supra* note 40, at A.4 (requiring at least one mediation session before going to arbitration); NYC *Mediation Rules, supra* note 40, at 984 ("[W]e are hopeful that disputant's use of the proposed mediation procedure will, in many cases, resolve their problem and avoid even arbitration."); *Denver Plan, supra* note 40.

43. NYC *Mediation Rules, supra* note 40, at 984.

44. *See supra* notes 16-20 and accompanying text.

45. *See supra* note 39 and accompanying text.

46. *See supra* note 12 and accompanying text.

47. *See, e.g.*, PA. RULES, *supra* note 40, at A.2.; NYC *Mediation Rules, supra* note 40, at 987.

48. Law firm dissolutions can come about because of differences in view about firm policy and strategy as well as simple personal problems the members might have with each other.

49. *See, e.g.*, Munyan v. Curtis, Mallet-Prevost, Colt & Mosle, 99 A.D. 2d 716, 472 N.Y.S.2d 321 (1984); Gartenberg v. Squadron, No. 21323 (N.Y. Sup. Ct., N.Y. County 1976); Londin v. Carro Spanbock Londin Fass & Geller, 124 Misc. 2d 1013, 478 N.Y.S. 2d 452 (1984); Terry, *Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups*, 61 TEMP. L.Q. 1055 (1988).

merit.

Fee disputes among attorneys can be especially hostile. Fee disputes generally fall into two different categories: disputes that result from a relationship between two or more attorneys, and disputes that do not result from a relationship between attorneys. For example, if a client hires two attorneys for two unrelated matters, a dispute may arise if the client expects to pay the second attorney from the judgment he receives in the case handled by the first attorney. Specifically, one hypothetical suggested a case in which a divorce attorney awaited payment of his fees from the recovery in the client's personal injury action, which was handled by another attorney.[50] Fee disputes resulting from an existing relationship between two or more attorneys include disputes over fee splitting in contingent fee cases involving co-counseling, as well as disputes between an associate who leaves a firm before concluding a contingent fee case that he started while employed by the firm.[51]

The *Pennsylvania Rules of Professional Conduct*[52] provide a good example of a fee dispute arising from a pre-existing relationship. The Pennsylvania rule regarding attorney's fees is more lenient than the corresponding rule in the Model Rules.[53] Pennsylvania, unlike the Model Rules, does not require the division of fees between lawyers to be "in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer [to] assume joint responsibility for the representation."[54] As a result, one lawyer or firm can enter into an informal agreement to, in effect, "sell" some of a potential client's legal work to another lawyer.[55] If representation of the client leads to recovery, disputes can arise as to what portion of the fees is due to the lawyer who originally referred the client to the representing attorney. Although many times this problem can be solved by a simple agreement, it can also lead to potentially nasty litigation.

Disputes among lawyers are particularly well suited for resolu-

50. *See* Judd & Vaksdal, *Resolving Disputes Between Lawyers: The DBA Intraprofessional Committee*, 18 COLO. LAW. 923, 924 (1989) (hypothetical mediation situation involving dispute arising between divorce action counsel and personal injury action counsel).

51. *Id.* at 924 (hypothetical arbitration situation involving co-counsel dispute).

52. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT (1988).

53. *Compare* PA. RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1988) *with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1983) [hereinafter MR 1.5(e)].

54. MR 1.5(e)(1) (1983).

55. Normally, if the attorney who refers the client to another attorney expects to be paid if there is a recovery, he will probably draft a written agreement. No agreement may be drafted, however, because of a perceived trust between the individuals or because of mere oversight.

tion through mediation. Legal disputes of this type, however, also have the potential to raise ethical issues. In particular, issues dealing with a lawyer's duty to disclose to appropriate disciplinary authorities another lawyer's misconduct discovered during mediation proceedings are a major concern.

B. Misconduct Disclosure Requirements

Our society has always been deeply ambivalent towards those who betray confidences. Whether the person is the childhood "snitch", the police officer's "confidential source," or the corporate "whistle blower," these people are often met with scorn from society and are often cast out of private cliques. Such breaches of confidence, no matter who is the perpetrator, leaves everyone less secure in their reliance on others.

Most people would think that lawyers would be opposed to reporting each other's misconduct. Nevertheless, since the beginning of this century, the American Bar Association has imposed a requirement to "squeal" on fellow lawyers who violate attorney codes of conduct.[56] Both canons 28 and 29 of the original Canons of Professional Ethics had language creating duties that required lawyers to report the misconduct of other lawyers.[57] Canon 28 required lawyers with knowledge of another lawyer's practices of "stirring up litigation" to inform the authorities of such misconduct so that he could be disbarred.[58] Canon 29 charged all lawyers with a duty to uphold the honor of the profession.[59] To properly uphold the honor of the profession, the canon mandated that "lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession. . . ."[60] Notwithstanding the strong message that these canons were meant to send to the legal profession, these provisions did not effectively achieve their goal.[61] A 1970 report by the ABA Committee on Evaluation of Disciplinary Enforcement found that although lawyers had knowledge of misconduct on the part of other attorneys, relatively few complaints were submitted to discipli-

56. *See* ABA CANONS OF PROFESSIONAL ETHICS (1908).

57. *See* ABA CANON OF PROFESSIONAL ETHICS Canon 28 (1908) [hereinafter Canon 28]; ABA CANON OF PROFESSIONAL ETHICS Canon 29 (1908) [hereinafter Canon 29].

58. Canon 28, *supra* note 57.

59. Canon 29, *supra* note 57.

60. *Id.*

61. 95 REPORTS OF AMERICAN BAR ASS'N 783, 963 (1970). One of the problems specifically listed by the ABA Special Committee on Evaluation of Disciplinary Enforcement was the "[r]eluctance on the part of lawyers and judges to report instances of professional misconduct." *Id.*

nary agents.[62] The report also concluded that "[t]his fact has been cited as a major problem by nearly every disciplinary agency in the United States surveyed by this Committee."[63] The report recommended that, among other things, "sanctions should be imposed in appropriate circumstances, against attorneys and judges who fail to report attorney misconduct of which they are aware."[64]

1. Model Code of Professional Responsibility Disclosure Provisions.—The concerns and recommendations of the Committee were partially satisfied by the *Model Code of Professional Responsibility*, which became effective in January 1970.[65] The Model Code consists of three separate but interrelated parts: Canons,[66] Ethical Considerations,[67] and Disciplinary Rules.[68] Canon 1 of the Model Code states that: "A lawyer should assist in maintaining the integrity and competence of the legal profession."[69] Ethical Consideration 1-4 directs that lawyers should report unprivileged information about violations of the Disciplinary Rules to maintain the integrity of the profession.[70] Disciplinary Rule 1-103 (DR 1-103) requires all lawyers to report unprivileged knowledge of another lawyer's misconduct to the appropriate authority.[71] The provisions of the Model

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62. *Id.*
63. *Id.*
64. *Id.*
65. MODEL CODE, *supra* note 11.
66. Canons are "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, the legal system, and with the legal profession. They embody the general concepts from which the Ethical considerations and the Disciplinary Rules are derived." *Id.* Preliminary Statement.
67. "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive." *Id.*
68. The Disciplinary Rules are mandatory rules that establish "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.*
69. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 1 (1980) [hereinafter Canon 1].
70. EC 1-4 directs:

> The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules. A lawyer should, upon request, serve on and assist committees and boards having responsibility for administration of the Disciplinary Rules.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY Ethical Consideration 1-4 (1980) [hereinafter EC 1-4].
71. DR 1-103 Disclosure of Information to Authorities

> (A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
> (B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the

Code, unlike the provisions of the old Canons, are enforceable by disciplinary action.[72]

The *Model Code* provisions contained in DR 1-103(A) were judicially recognized in *Estates Theatres, Inc. v. Columbia Pictures Industries*.[73] In *Estates Theatres*, the federal district court held that an attorney who knew that the opposing attorney was representing his clients in violation of the conflict of interest rules[74] had a duty to report such misconduct to the court for its determination.[75] The court acknowledged that "[w]hile the Code does not have the force and effect of a statute, it is recognized by bench and bar as setting forth proper standards of professional conduct."[76]

DR 1-103(A) requires that all unprivileged knowledge of another lawyer's misconduct be reported.[77] Several court opinions and ethics opinions have interpreted the requirements of DR 1-103(A).[78] ABA Informal Opinion 1393 explained the meaning of "unprivileged" information in the context of DR 1-103.[79] The ABA Committee on Ethics and Professional Responsibility examined the disclosure requirements of state and local bar association fee dispute arbitration programs. The specific issue that the Committee addressed was whether the lawyer had a duty to report Discilinary Rules violations that were revealed during an arbitration session, notwithstanding the fact that the bylaws specifically prohibited disclosure of any information pertaining to the arbitration.[80] The Committee determined that the Code protects information which falls within the scope of the attorney-client privilege and also protects client secrets. The question under consideration, however, was not one dealing with either of these privileges.[81] The Committee explained

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conduct of lawyers or judges.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1980) [hereinafter DR 1-103].

72. *See supra* note 68.

73. 345 F.Supp. 93 (S.D.N.Y. 1972).

74. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980).

75. Estates Theaters, Inc. v. Columbia Pictures Indus., 345 F. Supp. 93, 98 (S.D.N.Y. 1972).

76. *Id.* at 95 n.1; *see also* E. F. Hutton & Co. v. Brown, 305 F. Supp. 371, 377 n.7 (S.D. Tex. 1969).

77. *See supra* note 71 and accompanying text.

78. Ethics opinions can be rendered by the ABA in response to an inquiry. State Bar Associations can also render such opinions. These opinions usually do not have the force and effect of law but are the best guide available to a lawyer in the absence of a court opinion. *See, e.g.*, Philadelphia Bar Ass'n Professional Guidance Comm., Op. 88-37 (1989) (caveat to opinion stating that opinion is only advisory and is not binding on the Disciplinary Board of the State Supreme Court).

79. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1393 (1977).

80. *Id.*

81. *Id.*

that what constitutes privileged knowledge of information is a matter of law. Accordingly, the rules governing the Committee precluded it from issuing opinions on questions of law.[82] Therefore, it is probably safe to say that when dealing with DR 1-103(A), an attorney is not bound to disclose information covered by a privilege recognized in his state.

Other ethics opinions have interpreted the term "knowledge" within the context of DR 1-103.[83] Opinions have made it clear that the knowledge required is more than just a suspicion.[84] The attorney must be sure that misconduct has occurred and that it is most likely a violation of the Code.[85] The wording of DR 1-103(A) has lead to a debate over who has a duty to report. In *ABA Informal Opinion* 1279, the Commission determined that an attorney has a duty to report not only another attorney's misconduct, but also his own misconduct if not protected by a privilege.[86] Indeed, in *Office of Disciplinary Counsel v. Casey*,[87] the Pennsylvania Supreme Court found that an attorney has a duty to report his own misconduct.[88] The question of whether an attorney can assert the privilege against self-incrimination has been litigated for many years, and has also been the subject of various commentaries.[89]

The disclosure provisions of DR 1-103 generated other problems. Beyond the problem associated with self-incrimination,[90] it was apparent that lawyers still failed to report each other's misconduct.[91] Even when attorney's did report, there were few cases in which discipline was actually imposed.[92] Outside of the reporting

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82. *Id.*

83. *See, e.g.*, Ala. State Bar Ass'n Disciplinary Comm'n., Op. 85-95 (1985); N.Y. City Bar Ass'n Comm. on Professional Ethics, Op. 80-42 (1980).

84. *See, e.g.*, Ala. State Bar Ass'n Disciplinary Comm'n, Op. 85-95 (1985); N.Y. City Bar Ass'n Comm. on Professional Ethics, Op. 80-42 (1980).

85. *See, e.g.*, Ala. State Bar Ass'n Disciplinary Comm'n Op. 85-95 (1985); N.Y. City Bar Ass'n Comm. on Professional Ethics, Op. 82-79 (1982) ("Lawyers should refrain from casting unwarranted aspersions on their colleagues.").

86. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1279 (1973).

87. 511 Pa. 177, 512 A.2d 607 (1986).

88. *Id.* at 185, 512 A.2d at 611.

89. *See In re* Cornelius, 520 P.2d 76 (Alaska 1974); Note, *Self-Incrimination: Privilege, Immunity and Comment in Bar Disciplinary Proceedings*, 72 MICH. L. REV. 84 (1973); Comment, *The Privilege Against Self-Incrimination in Bar Disciplinary Proceedings: Whatever Happened to Spevak?*, 23 VILL. L. REV. 127 (1978).

90. *See supra* notes 86-89 and accompanying text.

91. *But see In re* Himmel, 125 Ill. 2d 531, 533 N.E.2d 790 (1988) (lawyer suspended from practice for one year as a result of not complying with the disclosure requirements of 1-103(A)). In the wake of the *Himmel* decision, 331 complaints were received under rule 1-103(A). Marcotte, *The Duty to Inform*, A.B.A. J., May 1989, at 17.

92. *See, e.g., In re Himmel*, 125 Ill. 2d 531, 533 N.E.2d 790 (1988); Attorney Grievance Comm. v. Kahn, 290 Md. 654, 431 A.2d 1336 (1981); *In re* Bonafield, 75 N.J. 490, 383

problem, another problem existed. Disciplinary Boards often encountered difficulties in obtaining necessary evidence because lawyers were reluctant to testify in disciplinary hearings unless they had previously reported the misconduct. If they had not reported the misconduct, the failure to do so might have subjected them to disciplinary action.[93]

Because the Commission disagreed with the format of the Code and found problems with its enforcement, the Commission concluded that piecemeal amendment of the Code would not sufficiently clarify the legal profession's ethical responsibilities in light of changed conditions. The Commission therefore drafted a new set of rules designed to replace the Model Code.[94]

2. Model Rules of Professional Conduct Disclosure Provisions.—Although the Model Code is still the basis for a minority of states' professional responsibility laws,[95] the *Model Rules of Professional Responsibility* (Model Rules) form the basis for a majority of the states' laws.[96] Many of the states that have adopted the Model Rules have adopted the Rules in their entirety. Some states, however, have adopted only portions of the Model Rules and have chosen to retain most of the Model Code.[97]

The Model Rules were promulgated in 1983 by the American

A.2d 1143 (1978). *See also Duty to Report/Respond*, Law. Man. on Prof. Conduct, 101:201, 101:203 (ABA/BNA 1989).

93. *See* Hood, *Renewed Emphasis on Professional Responsibility*, 35 LA. L. REV. 719, 741-42 (1975).

94. ABA Comm. on Evaluation of Professional Standards, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 3 (1984) [hereinafter ANNOTATED RULES].

95. *See, e.g.*, ILL. CODE OF PROFESSIONAL RESPONSIBILITY (1980).

96. *See, e.g.*, ARIZ. RULES OF PROFESSIONAL CONDUCT (1985); ARK. RULES OF PROFESSIONAL CONDUCT (1986); CONN. RULES OF PROFESSIONAL CONDUCT (1986); DEL. RULES OF PROFESSIONAL CONDUCT (1985); FLA. RULES OF PROFESSIONAL CONDUCT (1987); IDAHO RULES OF PROFESSIONAL CONDUCT (1986); IND. RULES OF PROFESSIONAL CONDUCT (1987); KAN. RULES OF PROFESSIONAL CONDUCT (1988); LA. RULES OF PROFESSIONAL CONDUCT (1987); MD. RULES OF PROFESSIONAL CONDUCT (1987); MICH. RULES OF PROFESSIONAL CONDUCT (1988); MINN. RULES OF PROFESSIONAL CONDUCT (1985); MISS. RULES OF PROFESSIONAL CONDUCT (1987); MO. RULES OF PROFESSIONAL CONDUCT (1986); MONT. RULES OF PROFESSIONAL CONDUCT (1985); NEV. RULES OF PROFESSIONAL CONDUCT (1986); N.H. RULES OF PROFESSIONAL CONDUCT (1986); N.J. RULES OF PROFESSIONAL CONDUCT (1984); N.M. RULES OF PROFESSIONAL CONDUCT (1987); N.C. RULES OF PROFESSIONAL CONDUCT (1985); N.D. RULES OF PROFESSIONAL CONDUCT (1988); OKLA. RULES OF PROFESSIONAL CONDUCT (1988); PA. RULES OF PROFESSIONAL CONDUCT (1988); S.D. RULES OF PROFESSIONAL CONDUCT (1988); UTAH RULES OF PROFESSIONAL CONDUCT (1988); VA. CODE OF PROFESSIONAL RESPONSIBILITY (1983); WASH. RULES OF PROFESSIONAL CONDUCT (1985); WIS. RULES OF PROFESSIONAL CONDUCT (1988); WYO. RULES OF PROFESSIONAL CONDUCT (1987); W. VA. RULES OF PROFESSIONAL CONDUCT (1989).

97. *See, e.g.*, OR. CODE OF PROFESSIONAL RESPONSIBILITY (1986); VA. CODE OF PROFESSIONAL RESPONSIBILITY (1983); N.C. RULES OF PROFESSIONAL CONDUCT (1985).

Bar Association after approximately six years of evaluation and discussion.[98] The Model Rules' format is different from that of the Model Code.[99] The Model Rules consist of a series of black letter rules and accompanying comments in the so-called "restatement form."[100] Some of the Model Rules are imperatives requiring certain behavior while others are merely recommendations as to the conduct of lawyers.[101]

For example, Model Rule 8.3 (MR 8.3), which is the disclosure rule counterpart to DR 1-103, is an imperative rule.[102] MR 8.3(a) requires that "[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyers honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."[103] The comment to MR 8.3 explains that if a lawyer was required to report every violation of the Rules, the failure to do so would itself be a professional offense.[104] The comment further notes that such a requirement did exist in many jurisdictions at one time, but proved to be unenforceable.[105]

In interpreting MR 8.3 the comment makes clear that the reporting requirements are limited "to those offenses that a self-regulating profession must endeavor to prevent."[106] Model Rule 8.3 requires a lawyer to use judgment before deciding to report another lawyer's misconduct.[107] The term "substantial" in the Rule refers to the seriousness of the offense and not the amount of evidence available to the lawyer.[108] Like DR 1-103, MR 8.3 has exceptions.

Model Rule 8.3(c) states that the rule does not apply to disclosure of information otherwise protected by Rule 1.6.[109] Rule 1.6 deals with information that is protected by the Attorney-Client privi-

98. *See* ANNOTATED RULES, *supra* note 94, at 3.
99. *See generally* MODEL RULES, *supra* note 6.
100. *Id.*
101. *See generally* MODEL RULES, *supra* note 6.
102. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1983) [hereinafter MR 8.3].
103. *Id.*
104. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 8.3 comment (1983) [hereinafter comment].
105. *Id.* (the requirement referred to in this comment is that of DR 1-103).
106. *Id.*
107. *Id. See also* G. HAZARD, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT, 560-64 (1985). "Applying the law to themselves, lawyers thus exercise an enormous amount of discretion and make an unending series of judgement calls." Id. at 560; Philadelphia Bar Ass'n Professional Guidance Comm., Op. 88-36 (1988); Philadelphia Bar Ass'n Professional Guidance Comm., Op. 88-37 (1988).
108. *See* Comment *supra* note 102.
109. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(c) (1983).

lege.[110] Although MR 8.3 acknowledges the Attorney-Client exception, the overall exceptions to MR 8.3 appear to be more narrow than those supplied by DR 1-103.[111] In the context of exceptions and privileges to the reporting requirements, however, MR 8.3 is broader.[112] There appear to be no cases or ethics opinions interpreting MR 8.3,[113] so it is hard to predict the Rule's effectiveness at this time.[114]

Some of the problems with DR 1-103 have been solved by MR 8.3.[115] The self-incrimination problem inherent in the wording of DR 1-103 is no longer present in MR 8.3, which requires only that a lawyer report "another" lawyer's misconduct.[116] Reporting may be encouraged under the Model Rule's more narrow requirements;[117] however, this is yet to occur. The problem of the reluctance of members of the bar to offer evidence to disciplinary boards, discussed earlier, is still a problem, and will remain a problem in any disclosure rule that does not provide immunity for attorneys offering such evidence.[118]

Regardless of the costs and benefits of any disclosure provision, most states do have some kind of reporting requirement in this area.[119] These disclosure requirements seem, on the surface, to contradict directly the need for confidentiality in mediation involving lawyer/lawyer disputes.

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110. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) [hereinafter Rule 1.6].

111. *Compare id. with* DR 1-103, *supra* note 71 and accompanying text.

112. *See supra* note 111.

113. *But see*, Md. Bar Ass'n Ethics Comm., Op. 89-46 (1989); N.M. Bar Ass'n Advisory Opinions Comm., Op. 1988-8 (1988); Philadelphia Bar Ass'n Professional Guidance Comm., Op. 88-37 (1989); Philadelphia Bar Ass'n Professional Guidance Comm., Op. 88-23 (1988); Philadelphia Bar Ass'n Professional Guidance Comm., Op. 88-36 (1988).

114. This author was unable to find any cases involving a violation MR 8.3. This is not surprising in light of the limited number of cases reported under DR 1-103. *See supra* note 92 and accompanying text. Another factor contributing to the lack of a case law is the relatively short time MR 8.3 has been in effect. *See supra* note 96.

115. *See supra* notes 90-93 and accompanying text.

116. *Compare* MR 8.3 *with* DR 1-103.

117. Despite the perceived disregard of DR 1-103 and MR 8.3, studies indicate that most lawyers are willing to report serious violations of professional responsibility. *See* Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 539 (1986); Note, *The Lawyers Duty to Report Professional Misconduct*, 20 ARIZ. L. REV. 509, 515-16 (1978).

118. *See supra* note 93 and accompanying text.

119. *But see* Los Angeles County Bar Ass'n Ethics Comm., Op. 440 (1986) (California lawyers have no ethical duty to report unethical conduct).

III. Problems Raised by the Model Rules' Disclosure Provisions and Mediation's Need for Confidentiality

A. Analysis of the Problem

A review of the history and background of confidentiality in mediation and the disclosure requirements of the Model Rules shows that both are essential.[120] Both of these requirements, however, seem to be facially contradictory to each other when viewed in the light of lawyer dispute mediation.

In a lawyer-dispute mediation, the problem a lawyer faces is similar to the problem faced by any mediator addressing a dispute that does not involve the mediation confidentiality privilege.[121] In this type of situation, the mediator cannot honestly tell the parties that everything said in the mediation will be kept confidential.[122] The Model Rules' disclosure requirements cause lawyer mediators in lawyer dispute resolution programs to face two equally unappealing alternatives. First, the mediator can inform the disputing lawyers at the outset of the mediation that any statements made during the session will be kept confidential, unless the mediator has a duty to disclose under the Model Rules.[123] Second, the mediator can inform the disputants that all mediation communications will be kept confidential, subject only to a waiver by the parties. In the second situation, the mediator has to hope that nothing comes up during the mediation that will trigger the duty to disclose.[124] Neither alternative is acceptable, however, if lawyer dispute resolution programs are to be successful.

For mediation to be successful, total candor by all participants is necessary.[125] Without a meaningful guarantee of confidentiality, the perception of the mediator as a neutral party will be lost.[126] Moreover, the disputant will have to measure every word he says for fear that he might reveal some misconduct on his part that the mediator or the other lawyer would be obligated to report. Under these

120. *See supra* notes 21-119 and accompanying text.

121. Privilege here refers to the statutes, case law, and rules of evidence that guarantee confidentiality in most jurisdictions. *See supra* notes 31-38 and accompanying text.

122. *See supra* notes 21-23 and accompanying text.

123. *See* PA. RULES, *supra* note 40, Rule B.13.

124. *See* NYC *Mediation Rules, supra* note 40, Rule 9 (New York has not adopted the Model Rules so such a statement would not be untruthful if the courts consider the information to be privileged in the lawyer mediation context).

125. Total candor can be achieved only through a guarantee of confidentiality. *See supra* note 23.

126. *See ABA Standing Comm. on Dispute Resolution Report to the House of Delegates*, 12 SETON HALL LEGIS. J. 65, 69 (1988).

conditions, the mediator has a hard time exposing the underlying causes of the dispute, which the parties must reveal to reach a meaningful settlement.[127] A complete lack of confidentiality, however, can have serious consequences on lawyer mediation programs.

Some lawyers may choose not to try mediation. They may feel that they are better off going through litigation,[128] rather than risking a disclosure of misconduct during mediation which could and should be reported. Furthermore, some of the most qualified lawyer-mediators might choose not to get involved in mediation programs for fear that they will have to report other lawyers misconduct and testify at disciplinary hearings as a result of disclosure.[129] It is therefore necessary to resolve the conflict between the desire for confidentiality and the need for disclosure.

There appears to be no case law addressing this conflict.[130] States that have not adopted the Model Rules but still utilize the Model Code may find it easier to resolve this conflict, however. The Model Code allows states to make mediation communications privileged and thus side step the reporting requirements.[131] A majority of the states,[132] however, must deal with the confidentiality-disclosure conflict or the effectivenss of lawyer mediation programs' will be limited.

B. Exceptions to the Duty to Disclose

Several theories have been expressed that would provide an exception to Model Rule 8.3's duty to disclose. These exceptions involve interpretations of other Model Rule provisions and interpretations of the Model Rules' overall purposes. These exceptions include two types: explicit exceptions and implicit exceptions.

1. Explicit Exceptions to the Duty to Disclose.—Although no explicit exception to the duty to disclose appears in MR 8.3,[133] there is a view of mediation that might obviate the duty to disclose. The

127. *See supra* text accompanying note 27.

128. *See supra* text accompanying notes 45-49.

129. Testifying at another lawyer's disciplinary hearing not only would put lawyer mediators in an uncomfortable position, but also would destroy the perception of neutrality necessary for effective mediation.

130. *But see* N.J. Bar Ass'n Ethics Comm., Op. 494 (1982) (granting attorney mediators the same immunities nonattorney mediators enjoy in nonlawyer dispute mediation settings).

131. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1393 (1977) (the issue of privilege is a matter of law).

132. *See supra* note 96 and accompanying text.

133. *See supra* notes 109-12 and accompanying test.

lawyer-mediator can be viewed as representing both of the parties in the mediation.[134] This position is supported by some ethics opinions, although these opinions appear to be limited to the facts involved in the particular situations.[135]

Lawyer-mediators do not consider themselves to be representatives of the parties to a mediation. The definition of mediation implies that the lawyers are not representing the parties.[136] Model Rule 2.2,[137] which refers to the lawyer as an intermediary, addresses a lawyer-client relationship that in fact does not exist in mediation.[138] The comment to MR 2.2 states that the rule applies to situations in which a lawyer-client relationship exists.[139] The comment further states that it specifically "does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties."[140] Further support for this idea is found in

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134. *See* Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984). Professor Riskin refers to this as the traditional approach to mediation. Riskin explains that "[t]he traditional ethics opinions conceive of the neutral lawyer as engaging in 'multiple representation.' " *Id.* at 338.

135. *See, e.g.*, N.H. Bar Ass'n Ethics Comm., Op. 1982-3-16 (1982) (this opinion deals with divorce mediation in which a prior lawyer-client relationship existed between both parties to the mediation). For a comprehensive survey of ethics opinions in the divorce mediation area that lies outside the scope of this Comment, see Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107 (1982).

136. *See supra* note 3.

137. Model Rule 2.2 provides:

> (a) A lawyer may act as intermediary between clients if:
>
> (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;
>
> (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful; and
>
> (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.
>
> (b) While acting as an intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.
>
> (c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983) [hereinafter, MR 2.2].

138. *Id.*

139. MR 2.2 comment ("A lawyer acts as an intermediary in seeking to establish or adjust a relationship between clients . . . .").

140. *Id.*

lawyer dispute mediation program rules, which emphasize that the lawyer is not representing either party.[141]

Even if a lawyer was acting as an intermediary in accordance with MR 2.2, the rule's comment provides that the lawyer-client privilege does not apply to protect any communications should litigation arise.[142] Furthermore, even if a lawyer-client relationship does exist, it is unlikely that the court would allow the attorney-client privilege to be invoked by an attorney to avoid the disclosure requirements under MR 8.3.[143] Therefore, the attorney would be guilty of violating MR 8.3 if he did not expose the misconduct of an attorney that was revealed to him during mediation.

2. Implicit Exceptions to the Duty to Disclose.—Even though no explicit exceptions to MR 8.3's duty to disclose exist, at least one noted scholar in the area believes that MR 8.3 should be read to imply a privilege for lawyers acting as mediators in lawyer mediation programs.[144] Professor Geoffrey Hazard admits that a literal reading of MR 8.3 would require a lawyer-mediator to report any lawyer misconduct revealed to him during a mediation session, but he believes that to require a lawyer-mediator to report the misconduct would give MR 8.3 too strict a reading.[145] Professor Hazard admitted that the Kutak Commission, in debating and drafting the Model Rules, never considered the situation in which a lawyer would gain knowledge of another lawyer's misconduct through the mediation process.[146] It is not surprising, therefore, that no discussion of this situation appears in the comment to MR 8.3 or the legislative history of the Model Rules.[147] Professor Hazard also believes that, as worded, MR 8.3 is too strict and unclear, making it very difficult for lawyers to decide exactly when they must disclose another lawyer's misconduct.[148]

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141. *See, e.g.*, PA. RULES, *supra* note 40, Rule B.14.

142. *See supra* note 137.

143. *See supra* note 102 and accompanying text.

144. Telephone interview with Geoffrey C. Hazard, Sterling Professor of Law at Yale Law School (Nov. 13, 1989) [hereinafter Hazard interview].

145. *Id.*

146. *Id.* The Kutak Commission, named for its Chairman, is the ABA Commission on Evaluation of Professional Standards, which was appointed in the summer of 1977 by then ABA President William Spann, Jr. This commission, along with the ABA House of Delegates Drafting Committee, eventually drafted the Model Rules. Professor Hazard was the Reporter of the Kutak Commission. *See* ANNOTATED RULES, *supra* note 94, Chairman's Introduction.

147. Hazard Interview, *supra* note 144; ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULE OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 196 (1987) (rule adopted as proposed by the Kutak Commission).

148. Hazard Interview, *supra* note 144.

Although Professor Hazard's interpretation of MR 8.3 is an appealing alternative to the literal interpretation of the rule, it is unlikely that the courts would adopt such a liberal interpretation of the rule. In *In re Himmel*,[149] the defendant learned of the other lawyers' misconduct from his client, who requested that Himmel refrain from reporting the other attorney's misconduct. The court nevertheless found Himmel to be in violation of the duty to report and suspended him from the practice of law for one year.[150] The court held that the attorney-client privilege did not protect Himmel, even though he would not have known of the misconduct but for his client's revelation.[151] The *Himmel* decision indicates that courts narrowly interpret the disclosure rules. Therefore, it is unlikely that courts will recognize an implied exception to MR 8.3's disclosure requirements in the context of lawyer dispute mediation.

Because there appear to be no exceptions to MR 8.3 for lawyer-mediators, provisions must be implemented to make lawyer-mediation programs successful. There are several alternatives in areas related to lawyer-mediation that merit examination.

C. *Solutions for Lawyer-Mediators*

1. Legislation as a Reaction to the Problem.—A possible solution to the dilemma faced by lawyer-mediators is to enact legislation that would give lawyers the privilege not to disclose misconduct discovered during mediation. To pigeonhole the privilege into an already existing mediation confidentiality statute, however, would require an extremely broad interpretation of these statutes.[152] Even in those states that grant broad protection to mediation, one would have to read into the pertinent statute a privilege that information discovered through lawyer-dispute mediation could not be revealed at lawyer disciplinary hearings.[153]

There are two problems with such a proposal. First, states that

149. 125 Ill. 2d 531, 536, 533 N.E.2d 790, 792 (1988). The attorney whose misconduct Himmel had learned of through his client was the attorney who had represented the client in a previous successful personal injury action, and had subsequently converted the recovery. Himmel was retained by the client to collect the settlement from the other attorney. *Id.* at 535, 533 N.E.2d at 791.

150. *Id.* at 546, 533 N.E.2d at 796.

151. The court found that the information was knowledge of illegal conduct involving moral turpitude and thus was not covered by the privilege. *Himmel*, 125 Ill. 2d at 543, 533 N.E. 2d at 793; *but see* Md. Bar Ass'n Ethics Comm., Op. 89-46 (1989) (Ethics Committee faced with a similar situation as the court in *Himmel* found that the attorney-client privilege protected the attorney's nondisclosure).

152. *See, e.g., supra* notes 35-38 and accompanying text.

153. *See, e.g., supra* note 37.

grant only a limited privilege to mediation proceedings,[154] or that rely on rules of evidence to protect mediation,[155] would have difficulty stretching their statutes to cover the lawyer dispute mediation dilemma. Moreover, states that do not have such statutes would be at a greater disadvantage. This problem can be overcome by drafting a new statute to cover the situation. Some lawyers, however, may object to such a statute as being worthless.[156]

A further problem is judicial acceptance of reform statutes. In some states, rules governing the legal profession are in the sole province of that state's supreme court.[157] Accordingly, any rules or statutes that the legislature tries to apply to members of the bar can be struck down as an unconstitutional infringement on the power of the judiciary and a violation of separation of powers.[158] Therefore, it is unlikely that a state supreme court disciplinary board would stretch a mediation confidentiality statute to protect lawyers who do not disclose misconduct that they are obligated to disclose under MR 8.3.

2. Exceptions Attempted in Other Contexts.—Some states have succeeded in securing exemptions from MR 8.3's disclosure provisions in a situation other than in mediation between lawyers. That situation deals with drug and alcohol treatment. The legal profession has not escaped the drug and alcohol problems prevalent in today's society.[159] Since a large number of disciplinary cases involve drug and alcohol abuse,[160] several state bar associations have instituted lawyer help programs to detect and treat these illnesses.[161] These programs, like all drug and alcohol rehabilitation programs, require confidentiality to insure that lawyers are candid with those who can help them. Moreover, these programs attract laywers who would not otherwise take part without a guarantee of

154. *See, e.g., supra* text accompanying note 36.

155. *See, e.g., supra* note 36 and accompanying text.

156. *See supra* note 38 and accompanying text.

157. *See, e.g.*, PA. CONST. art. V, § 10, cl. c.

158. *See, e.g.*, Kremer v. State Ethics Comm'n, 503 Pa. 358, 469 A.2d 593 (1983) (Financial disclosure provisions of the Ethics Act, PA. STAT. ANN. tit. 65, §§ 404-05 (Purdon Supp. 1989), as applied to Judges, are unconstitutional infringement on judiciary and violate the separation of powers doctrine).

159. *See* Tenn. Bd. of Professional Responsibility, Formal Op. 83-48 (1983). This opinion originally applied only to elected members of the Drug and Alcohol Abuse Committee, but was later expanded to include all participants and volunteers who participate in the program. Tenn. Bd. of Professional Responsibility, Formal Op. 83-48(a) (1987).

160. Tenn. Formal Op. 83-48, *supra* note 159.

161. *See, e.g.*, KAN. SUP. CT. R. 206; N.H. Bar Ass'n Professional Continuity Comm., Lawyers Assistance Program (undated) (copy on file at Dickinson Law Review office).

confidentiality.[162]

Confidentiality in lawyer help programs is achieved in several ways. State supreme courts have adopted rules dealing specifically with the situation. These rules provide complete confidentiality in all proceedings, information, meetings, reports, and records of such committees.[163] In other states, ethics committees have issued opinions that grant help program members immunity from the disclosure provisions of the rules of professional conduct.[164] Still other states have provided for an exception by amending MR 8.3 explicitly to exempt members of these lawyer help programs from their duty to disclose other lawyers' misconduct.[165] Regardless of how confidentiality is accomplished, the various rules appear to be successful.

According to one program director, originally there was a problem with lack of participation in the program.[166] An increase in the use of the program came about once the rules were changed so that members could guarantee confidentiality to participants.[167] Not only did program participation rise, but members of the program were able to work under much better circumstances knowing that they would not have to report misconduct that came to their attention during the help sessions.[168] The success of lawyer help programs provides a promising alternative to the existing dilemma faced by lawyer mediators with respect to disclosure requirements.

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162. Tenn. Formal Op. 83-48, *supra* note 159.

163. *See, e.g.*, KAN. SUP. CT. R. 206(c).

164. *See* N.Y. Bar Ass'n Comm. or Professional Ethics, Op. 531 (1981); Mo. Bar Admin. Advisory Comm., Informal Op. 5 (1982); Tenn. Formal Op. 83-48, *supra* note 159.

165. Oklahoma's version of Model Rule 8.3 provides:

> (a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate authority.
>
> . . . .
>
> (c) This rule does not require disclosure of information otherwise protected by Rule 1.6.
>
> (d) The provisions of Rule 8.3(a) shall not apply to lawyers who obtain such knowledge while acting as a member, investigator, agent, employee, or as a designee of the Oklahoma Bar Association Lawyers Helping Lawyers Committee, in the course of assisting another lawyer. Any such knowledge received by a committee member shall enjoy the same confidence as information protected by the attorney-client privilege under applicable law.

OKLA. RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1988). *See also* KAN. RULES OF PROFESSIONAL CONDUCT Rule 8.3(c) (1988); N.H. RULES OF PROFESSIONAL CONDUCT Rule 8.3(c) (1986); OR. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(E)(1) (revised 1989); WIS. RULES OF PROFESSIONAL CONDUCT Rule 8.3(c) (1988); W. VA. RULES OF PROFESSIONAL CONDUCT Rule 8.3(d) (1989).

166. Telephone interview with George Roemer, Director of the Oregon State Lawyers Assistance Comm. (Nov. 8, 1989).

167. *Id.*

168. *Id.*

IV. An Alternative to the Proposals

If mediation is to be successful as an alternative to litigation between lawyers, the strict requirements of MR 8.3 must be amended. Ignoring the problem until a state disciplinary board sanctions a lawyer-mediator, or a lawyer-disputant, is unacceptable. Statutory enactments, however, are likely to encounter separation of powers problems in some states.[169] Perhaps the most practical cure for this problem would be to amend MR 8.3 to provide an exception to the duty to disclose in the mediation context, much the same way that exceptions are made for drug and alcohol programs.[170] By amending MR 8.3, all the benefits of confidentiality in mediation can be achieved[171] at a comparatively low cost to the integrity of the legal profession.

If MR 8.3 was amended to exclude from its provisions lawyer dispute mediation program participants and mediators, it is likely that these programs will enjoy increased use, as lawyer help programs have.[172] More attorneys would be willing to participate as mediators in these programs knowing that they would not have to disclose misconduct that they discovered during mediation. Furthermore, a mediator could guarantee disputants that complete confidentiality would be maintained. As a result disputants would be much more truthful with the mediator. At first glance, it appears that such a blanket protection for mediation would provide the perfect shelter for a lawyer who wants to settle a dispute that involves his serious misconduct and, therefore, would be used as a method to escape discipline for such misconduct. Nonetheless, these problems can be avoided by simple provisions that already exist in mediation rules.

A provision can be inserted into the mediation rules that provides that the program administrator will have the right to decline to mediate a dispute or to cease to mediate a dispute when it appears that the dispute involves a probable violation of the *Rules of Professional Conduct*.[173] Furthermore, if the dispute involves serious violations of the Rules, the opposing party will usually know about the violations and will have a duty to report such violations anyway. Since both disputants must agree to mediation,[174] it is unlikely that one attorney will agree to mediate a dispute if he suspects that the

169. *See supra* notes 33, 156-57 and accompanying text.
170. *See supra* notes 165-68 and accompanying text.
171. *See supra* notes 17-20 and accompanying text.
172. *See supra* notes 165-68 and accompanying text.
173. *See, e.g.*, PA. RULES, *supra* note 40, Rule A.2(b).
174. *See, e.g.*, PA. RULES, *supra* note 40, Rule B.2.

other attorney is using the mediation process as a shelter from disciplinary proceedings.

Perhaps the most adverse consequence of an exception to the duty to disclose is that it might result in some unreported and unpunished lawyer misconduct. Nevertheless, it is debatable whether lawyers report misconduct now. Moreover, the small percentage of cases of unreported misconduct resulting from a mediation privilege would not substantially decrease the effectiveness of MR 8.3. The overall benefits of an effective alternative, however, substantially outweigh any decrease in the effect of MR 8.3.

V. Conclusion

Alternative methods of dispute resolution are not always as welcome as one might think. These alternatives often involve problems that were never anticipated when litigation and the adversarial process were the only means of settling disputes. Nonetheless, it is time that the legal profession realizes that many attractive alternatives to litigation exist, and that some accepted patterns and rules of conduct will have to change to accommodate them.

The relationship between the disclosure provisions of the *Model Rules of Professional Conduct* and the confidentiality privilege is not a comfortable one. Amendment of MR 8.3, however, is a solution to this problem. Unfortunately, this solution gives rise to other problems, including the possible use of mediation as a shelter by unethical lawyers. Until another solution is found, however, the uncertainty in this area will remain a stumbling block to successful alternative dispute resolution among lawyers. Although amendment of the rules will create new problems, perhaps such a solution is a necessary evil.

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